



Association Luxembourgeoise des Fonds d'Investissement – Association of the Luxembourg Fund Industry

Response to CESR's advice on possible implementing measures of the Transparency Directive

Luxembourg, March 4, 2005

The Association of the Luxembourg Fund industry (ALFI) is the representative body of the Luxembourg fund industry. Its membership includes funds as legal entities and professionals of the fund sector, among which depositary banks, fund administrations, transfer agents as well as asset managers. We welcome the opportunity to contribute to the consultation on CESR's Advice on possible Implementing Measures of the Transparency Directive and would like to make specific comments with regard to section 6 of this document relating to the conditions of independence to be complied with by management companies, investment firms and their parent undertakings to benefit from the exemptions in articles 11.3A and 11.3B of the Directive.

Scope of the exemption granted by article 11(3a) of the Directive:

In our view Article 11(3a) of the Transparency Directive grants an exemption from the aggregation of holdings to the parent undertaking of all management companies conducting management activities under the conditions laid down under the UCITS Directive, whether they are authorized under that Directive or not. In our opinion the definition of the management company in this context is a generic one. Although Article 11(3a) seems to refer Council Directive 85/611/EC, it does not require that the management company be authorized under the UCITS status. One should indeed avoid confusing the requirements of article 11(3a) with those of Article 11(3b) concerning investment firms.

We therefore agree with the second view on this issue outlined in CESR's paper.

Meaning of holdings referred to in Articles 11(3a) and (3b) of the Directive:

We agree with CESR's conclusion that Article 11(3a) of the Transparency Directive relates to all the holdings managed by the management company under the provisions of the UCITS Directive whether they be UCITS as defined in the UCITS Directive or not. The test of independence in this respect is linked to the relationship between the parent undertaking and the management company and not the nature of the holdings managed.

Level of independence and conditions to benefit from the exemption:

We fully agree with CESR's view that the level of independence of the management company should be appreciated in relation with the ability of the management company or investment firm to use the voting rights without any constraint from the part of its parent undertaking. We also agree on the assumption that even in case of delegation of the exercise of the voting rights to a third party by a management company or investment firm under the UCITS Directive or MiFID, the management company or investment firm retains the final control or supervision of the exercise of such rights.

In our view the various texts regulating the conduct of business, the internal organization and controls of management companies and investment firms (MiFID and UCITS Directives) and the exercise of voting rights in general (IOSCO recommendations and other national legislative measures) provide a sufficient framework for ensuring an adequate level of independence between management companies or investment firms and their parent undertakings. We do not see a specific need for requiring additional conditions or an additional confirmation in writing of the statement of independence made by the parent undertaking in order to benefit from the exemption.

Finally, as to the methods or criteria to be used to appreciate this independence, it should be underlined that a variety of solutions exist among the different jurisdictions of the EU. For this reason we are of the strong opinion that this issue should be dealt with on national level according to each legal environment specificities and taking into account the size and resources of the various structures concerned by the directive.